Office-Supreme Court, U.S.
FILED
NOV 18 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

BRIEF FOR PETITIONER ON CERTIORARI AND FOR WRIT OF MANDAMUS

CHARLES H. TUTTLE,
Counsel and Attorney for Petitioner,
15 Broad Street,
New York 5, New York.

JOHN F. KELLY,
STUART H. JOHNSON, JR.,
Also of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS	3
(1) Federal Constitutional Provisions	3
(2) Federal Statutes, Code and Regulations	3
(3) New York State Statutory Provisions	5
THE QUESTIONS INVOLVED	5
Introductory	5
The Questions	6
STATEMENT OF THE CASE	10
(1) The Nature of the Case	10
(2) Petitioner's Lawful Export Business	11
(3) The State Liquor Authority's Assertion that the Petitioner's Business is "Illegal" under New York Law	13
(4) The Institution of this Action to Protect the Petitioner's Federal Rights and Business	13
(5) The Representations of the State Liquor Authority Before Judge Bicks that the Petitioner's Business was not Threatened by it	14
(6) Judge Bicks' Decision Remitting the Petitioner to the State Courts	15

PAGE

(7) The Petitioner's Appeal and the Immediately Following Retaliation by the State Liquor Authority 15

(8) Judge Dimock's Decision 16

(9) The Court of Appeals' Decision 17

(10) Judge Cashin's Decision 18

(11) The Court of Appeals' Refusal to Recall and Clarify Its Judgment 19

SUMMARY OF ARGUMENT 19

Argument

POINT I—Since, with the express sanction of the U. S. Treasury Department, the petitioner was exercising rights and conducting a business legalized by federal statutes and rules regulative of commerce in furtherance of a national policy and in a field where the national power was exclusive and plenary, the petitioner had a federal right to protection of such sanctioned rights and business in the federal courts and could not lawfully be relegated to the uncertainties and restrictions of some futural suit in the courts of a state which had no sovereignty in the area wherein Congress had enacted and wherein state action was expressly prohibited by the Commerce, Import-Export and Supremacy Clauses 25

PAGE

POINT II—Moreover, the doctrine of abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it.

Here the facts, so far from being those requisite to the exception, exclude it 31

POINT III—An unbroken line of decisions in this and other federal courts uphold the right of this petitioner, by reason of the foregoing facts and principles, to an immediate and full exercise of the original jurisdiction of the district court 33

POINT IV—The decisions cited by Judge Bicks (52a-55a) are, we submit, wholly inapposite in their facts and rationales 38

POINT V—Furthermore, in abstaining the exercise of an acknowledged jurisdiction, pending some future state court action, Judge Bicks erred in his own reasoning by overlooking that the New York appellate courts had repeatedly held the New York Beverage Control Law inapplicable or "inoperative" as against the very thing here involved, namely, the export of liquor under Section 311 of the Tariff Act of 1930 and the Internal Revenue Code 40

POINT VI—Furthermore, even if, *arguendo*, the state remedies afforded by Alcoholic Beverage Control Law §121 were deemed available to the petitioner, they are by their very terms inadequate for the petitioner's protection and have been so held judicially 43

PAGE

POINT VII—Even assuming *arguendo* that Judges Bicks, Dimock and Cashin lawfully decreed abstention, nevertheless they should not have left the petitioner naked to the current lethal assaults upon it by the State Liquor Authority, but should have made their own reservation of jurisdiction meaningful by enjoining those assaults pending reasonably expeditious outcome in some future suit in the state courts. The refusal of Judges Bicks and Dimock to do so was appealable to the Court of Appeals 45

POINT VIII—Even if, notwithstanding the allegations of the complaint and affidavits, the doctrine of abstention could be considered, consideration of it was exclusively for the requested three-judge district court pursuant to 28 U. S. C. §§2281, 2284 46

POINT IX—In any event the Court of Appeals erred, we submit, in not vacating the orders of Judge Bicks and Judge Dimock, which it held to have been made without jurisdiction, and in not remitting the case for "such further proceedings to be had as may be just under the circumstances." 28 U. S. C. §2106 48

POINT X—Assuming for argument's sake that the petitioner was not entitled to the convening of a three-judge court, nevertheless it was entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C., Sections 1331 and 1337.

The refusals of the single-judge district court to proceed with the exercise of that jurisdiction and to grant the petitioner protection by temporary injunction were errors appealable to the Court of Appeals; and the action of the Court of Appeals in dismissing the appeals for lack of jurisdiction was further error 51

CONCLUSION 54

TABLE OF ATHORITIES

PAGE

Cases:

Alleghany County v. Mashuda Co., 360 U. S. 185 31
All American Airways v. Village of Cedarhurst, 201 F. 2d 273 ..... 20, 29, 30

Barcus v. O'Connell, 281 App. Div. 1064 ..... 22, 40, 44
Bell v. Waterfront Commission of New York Harbor, 279 F. 2d 853 48
Benati v. United States, 355 U. S. 96 44
Board of Supervisors v. Tureaud, 207 F. 2d 807 ..... 48, 50
Board of Trustees v. United States, 289 U. S. 48 ..... 27, 41
Bowles v. Willingham, 321 U. S. 503 ..... 37, 53
Burack v. State Liquor Authority of State of New York, 160 F. Supp. 161 ..... 22, 43
Burford v. Sun Oil Co., 319 U. S. 315 39

California Commission v. United States, 355 U. S. 534 ..... 21, 30, 34, 40, 46
Capital Service, Inc. v. Labor Board, 347 U. S. 501 24, 36, 53
Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 U. S. 77 ..... 21, 30, 34, 40
Chicago, Duluth & Georgian Bay Transit Co. v. Nims, 252 F. 2d 317 18
Collins v. Yosemite Park Co., 304 U. S. 518 ..... 29, 36
Corporation Comm. v. Cary, 296 U. S. 452 45

Dictagraph Products Co. v. Sonotone Corp., 230 F. 2d 131 51
Driscoll v. Edison Co., 307 U. S. 104 45
During v. Valente, 267 App. Div. 383 ..... 22, 27, 41, 42

Florida Lime Growers v. Jacobsen, Director, 362 U. S. 73 ..... 21, 35, 40, 46
Forsyth v. Hammond, 166 U. S. 506 31

PAGE

General Electric Company v. Callahan, 294 F. 2d 60 ..... 23, 29, 30, 37
Gully v. Interstate Natural Gas Co., 292 U. S. 16 ..... 23, 50

Harrison v. N. A. A. C. P., 360 U. S. 167 ..... 38, 46
Hillsborough v. Cromwell, 326 U. S. 620 ..... 42, 45
Hines v. Davidowitz, 312 U. S. 52 ..... 19, 21, 23, 27, 28, 37
Hood & Sons v. DuMond, 336 U. S. 525 ..... 20, 28

Johnson v. Yellow Cab Co., 321 U. S. 383 ..... 29, 33

Martin v. Creasy, 360 U. S. 219 38
Matter of Gulf Oil Corp. v. McGoldrick, 256 App. Div. 207 ..... 22, 27, 40, 42
Matter of Yacht Club Catering v. Bruckman, 276 N. Y. 44 ..... 22, 43
Maynard & Child, Inc. v. Shearer, Ky. 290 S. W. 2d 790 29
McGoldrick v. Gulf Oil Corp., 309 U. S. 414 ..... 20, 29, 40
M'Culloch v. Maryland, 4 Wheat. 316 35
Meredith v. Winter Haven, 320 U. S. 228 32
Mountain States Co. v. Comm., 299 U. S. 167 45

National Distillers Products Corp. v. City and County of San Francisco, 141 Cal. App. 2d 651 28

Oklahoma Gas Co. v. Packing Co., 292 U. S. 386 ..... 23, 49

Pacific Tel. Co. v. Kuykendall, 365 U. S. 196 44
Parrott & Co. v. City and County of San Francisco, 131 Cal. App. 2d 332 28
Penagaricano v. Allen Corporation, 267 F. 2d 550 30
Pennsylvania v. Nelson, 350 U. S. 497 ..... 20, 28, 29
Phillips v. United States, 312 U. S. 246 ..... 23, 49
Propper v. Clark, 337 U. S. 472 31
Public Utilities Commission v. Gas Co., 317 U. S. 456 ..... 24, 37, 53

PAGE

Query v. United States, 316 U. S. 486 ..... 24, 36, 53

Railroad Commission v. Pullman Co., 312 U. S. 496 39
Rice v. Santa Fe Elevator Corp., 331 U. S. 218 ..... 20, 21, 24, 28, 29, 52
Rosenblum v. Frankel, 279 App. Div. 66 ..... 22, 27, 42

San Diego Building Trades Council v. Garmon, 359 U. S. 236 30
Spector Motor Co. v. McLaughlin, 323 U. S. 100 39
Stratton v. St. Louis S. W. Ry., 282 U. S. 10 ..... 6, 17, 18

Two Guys From Harrison-Allentown v. McGinley, 266 F. 2d 427 50

United States v. Belmont, 301 U. S. 324 27

Statutes:

19 C. F. R. Parts 18 and 19 (U. S. Customs Regulations) 4, 7

California Agricultural Code 35

California Alcoholic Beverage Control Act 36

Constitution of the United States
- Article I, § 8 3
- Article I, §10 3
- Article III, §2 21
- Article VI 3
- Export-Import Clause 7, 19, 25, 26
- Foreign Commerce Clause 7, 19, 25,26
- Supremacy Clause 7, 19, 25

Florida Avocado Order No. 69 35

Federal Agricultural Marketing Agreement Act of 1937 35

Federal Rules of Civil Procedure
- Rule 1 21
- Rule 8(e)(2) 51
- Rule 8(f) 51
- Rule 54(c) 8, 21, 51
- Rule 57 ..... 8, 21, 51

Federal Alien Registration Act 37

Federal Communications Act, §605 44

Judicial Code, §266 ..... 49, 50

New York Consolidated Laws, Ch. 3-B 5, 22

New York State Alcoholic Beverage Control Law 5, 10 13, 22, 29, 42
- § 3(28) 13
- §121 ..... 5, 22, 43, 44
- §130 5

PAGE

Pennsylvania Alien Registration Act 37

19 U. S. C., Federal Tariff Act of 1930 28
§ 311 ..... 19, 20, 28, 40, 41, 52
§1311 ..... 4, 7, 12, 19, 28

26 U. S. C., Internal Revenue Code
§5521 ..... 4, 7, 19, 20, 52
§5522 ..... 4, 7, 19, 20, 52
§5523 ..... 4, 52

28 U. S. C.
§1254(1) 2
§1291 ..... 4, 9, 18, 23, 48
§1291(a)(1) 24, 46
§1292 ..... 9, 18
§1292(a)(1) 4, 23, 46, 48
§1331 ..... 4, 8, 10, 15, 17, 20, 23, 24, 51, 52
§1337 ..... 4, 8, 10, 15, 17, 20, 23, 24, 51, 52, 53
§1341 45
§1342 45
§1651(a) 2
§2106 ..... 4, 9, 19, 23, 48, 49
§2201 4
§2281 ..... 3, 7, 14, 46, 51
§2282 51
§2283 51
§2284 ..... 46, 51
§2284(1) 3, 7, 14
§2284(3) 3
§2284(5) 23, 47

United States Warehouse Act 52

IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondents.

BRIEF FOR PETITIONER ON CERTIORARI AND FOR WRIT OF MANDAMUS

Opinions Below

All opinions in the courts below appear in full in the Record at the pages hereinafter designated.

Judge Bicks' opinion and order of November 4, 1960, (49a)* are reported at 188 F. Supp. 434.

Judge Dimock's subsequent opinion of December 28, 1960, (88a) and order (93a) have not been reported.

The majority and dissenting opinions of the Court of Appeals (103a, 111a), filed April 14, 1961, dismissing Idlewild's appeals from the decisions of Judge Bicks and Judge Dimock, are reported at 289 F. 2d 426. The judgment of the Court of Appeals, dated April 14, 1961, appears at 116a.

Judge Cashin's subsequent opinion and order of May 31, 1961 (130a), are reported at 194 F. Supp. 3.

The order of the Court of Appeals granting a stay pending application for a review by the United States Supreme Court but denying Idlewild's application for clarification appears at 147a, and is not officially reported.

Jurisdiction

The jurisdiction of this Court is invoked as follows:

As to certiorari, the jurisdiction is invoked under 28 U. S. C. §1254(1). The time factors upon which such jurisdiction rests are stated above under "Opinions Below".

As to mandamus, the jurisdiction is invoked under 28 U. S. C. §1651(a). The time factors are the same.

By order entered October 9, 1961, this Court granted the petition for writ of certiorari and for leave to file petition for writ of mandamus.

---

* All references followed by a small "a" are to the Record. All references followed by a capital "A" are to the Appendix to the petition for certiorari in this Court.

Constitutional Provisions, Statutes and Regulations

(1) *Federal Constitutional Provisions*

(a) "The Congress shall have Power, * * * 3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes" (Art. I, §8).

(b) "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports" (Art. I, §10).

(c) "This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Art. VI).

(d) "The Congress shall have Power, * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Art. I, §8.)

(2) *Federal Statutes, Code and Regulations*

The Appendix to the petition for certiorari sets forth the pertinent provisions of the Federal Statutes, Internal Revenue Code and Regulations thereunder, providing for:

(a) a district court of three judges in constitutional cases involving state action. 28 U. S. C. §§2281 and 2284 (1) and (3) (148A);

(b) "original jurisdiction" of the federal district courts in a civil action which "arises under the Constitution, laws,

or treaties of the United States," or "arising under any Act of Congress regulating commerce." 28 U. S. C. §§1331 and 1337 (149A);

(c) appellate jurisdiction of the Circuit Court of Appeals over final orders of the district courts and over interlocutory orders of the district courts refusing injunctions. 28 U. S. C. §§1291 and 1292(a)(1) (149A);

(d) the powers of the federal appellate courts to affirm, modify, vacate, set aside, reverse, or remand. 28 U. S. C. §2106 (150A);

(e) the pertinent substantive provisions of the Federal Tariff Act of 1930. 19 U. S. C. §1311 (17a);

(f) the associated provisions of the Internal Revenue Code. 26 U. S. C. §§5521, 5522, and 5523 (150A-153A);

(g) the applicable U. S. Customs Regulations thereunder. 19 C. F. R., Parts 18 and 19 (154A-185A).

In addition there is involved 28 U. S. C. §2201 providing as follows in actions for declaratory judgment:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

(3) *New York State Statutory Provisions*

Provisions of the New York Alcoholic Beverage Control Law (Consolidated Laws, Ch. 3-B) are reprinted in the Record (30a-33a).

This statute, in permitting "review by courts", contains the mandatory provision (Section 121) "that no stay shall be granted pending the determination of the matter" except "for a period not exceeding thirty days"; and Section 130 makes the illegal selling of alcoholic beverages a misdemeanor punishable by a fine of not less than $200 nor more than $1200 or by imprisonment for not less than thirty days nor more than one year, or both.

The Questions Involved

Introductory

Judge Bicks denied the petitioner's application for a three-judge court, with leave to renew after a state court ruling in an action not then pending. He also refused the petitioner's motion for a temporary injunction (55a).

Judge Dimock held himself bound to follow Judge Bicks, notwithstanding proof of subsequent activities by the State Liquor Authority to shut down the petitioner's business forthwith (89a).

By dismissing the petitioner's appeals from the orders of Judges Bicks and Dimock, the Court of Appeals, according to its own acknowledgments (104a, 106a, 108a, 110a), let stand orders which it decided had been entered without jurisdiction (108a, 110a) but which "had the effect of dismissing a complaint" described by Judge Bicks as seeking "declaratory and injunctive relief" (52a); put the petitioner "effectively out of court", notwithstanding the admitted presence of "a substantial federal question", with "nothing left to be done in the federal courts because

the action there had been for all intents and purposes concluded"; and created the "unhappy" and "anomalous" result of "refusing access to our court to a party who we believe is entitled to relief" (104a, 106a, 108a, 110a).

The Court of Appeals further held that "a three-judge district court should have been convened" (109a), but viewed *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10, as constraining it to rule that, because the district court had lacked jurisdiction to do what it did, the Court of Appeals itself also lacked jurisdiction over all the issues and matters presented by the appeals and was bound to dismiss the appeals *in toto* and without more.

Thereafter, when the petitioner applied to Judge Cashin to convene a three-judge court in accordance with the Court of Appeals' decision that Judges Bicks and Dimock had "had no jurisdiction to proceed as he did" and should have convened a three-judge court (108a, 110a), Judge Cashin held that that part of its decision was mere "dictum", notwithstanding that it was the expressed essential basis for the Court of Appeals' own disclaimer of any appellate jurisdiction; and that the orders of Judges Bicks and Dimock, although declared by the Court of Appeals to have been without jurisdiction, were "still in full force and effect" and "still the law of this case" which he was bound to follow (130a-135a).

All the judges below recognized the immediate irreparable damage which faced the petitioner (51a, 90a, 91a, 104a, 131a).

The Questions

Hence, the common questions which are presented in the two petitions now before this Court are, as somewhat rephrased and separated in order to pin-point subsidiary questions but without change of substance:

(1) Were the petitioner and its established export business, sanctioned and controlled by the United States Government in implementation of its exclusive power over foreign commerce and reciprocity with foreign nations, entitled to the protection of the district court's original jurisdiction against later efforts by representatives of New York to suppress such business as illegal?

Put another way, did the district court abandon its duty by, instead, waving the petitioner into the courts of a sovereignty which had no jurisdiction over the area in which Congress had acted and hence no jurisdiction over the petitioner's federally approved and regulated export business?

(2) Since the undenied allegations of the complaint stated an admittedly "serious" and "substantial federal question" (91a, 104a) as to the legality of attempted State regulation and control of exports contrary to (a) the Foreign Commerce Clause, (b) the Export-Import Clause, (c) the Supremacy Clauses of the Constitution of the United States, (d) the preemptive national policy and provisions of the Tariff Act of 1930, 19 U. S. C. §1311, (e) the regulations thereunder (19 C. F. R. Parts 18 and 19), (f) the associated provisions of the Federal Internal Revenue Code (26 U. S. C. §§5521 and 5522), and (g) the express Ruling of the Treasury Department, Bureau of Customs, approving this petitioner and its business (15a), did Judge Bicks, in not convening a three-judge court, act contrary to the duty imposed and the jurisdiction limited by 28 U. S. C. §§2281 and 2284.

(3) Since the undenied allegations of the complaint also stated a case for declaratory and injunctive relief in protection of the petitioner's property rights created and possessed pursuant to federal statutory policy and sanction in the national interest and regulative of commerce in reciprocity with other nations (2a *et seq.*, 11a-12a), did Judge Bicks in effect deny and, contrary to duty, fail to exercise

the "original jurisdiction" imposed on the district court by 28 U. S. C. §§1331 and 1337 over any action (such as this) arising "under the Constitution, laws, or treaties of the United States" and "under any Act of Congress regulating commerce"? See F. R. C. P., Rules 54(c) and 57.

(4) In denying the petitioner's motions on further affidavits (a) for temporary injunction against the State Liquor Authority's effective threats against the petitioner's suppliers, (b) to quash the Authority's subpoena of the petitioner's records, and (c) to empanel a three-judge court to make the requisite determinations thereon (71a-81a), did Judge Dimock, like Judge Bicks and for the same reasons, act contrary to statutory duty and statutory jurisdiction (88a)?

(5) Since, as above stated (3), the complaint also stated a case arising under federal laws and thereby also invoked the "original jurisdiction" of the one-judge district court, did Judges Bicks and Dimock (a) improperly deny petitioner's application for a temporary injunction to restrain what both recognized as immediate irreparable jeopardy and damage (51a, 91a), and, instead, (b) improperly postpone the petitioner without interim protection to some future ruling of a state court in some future state action not then existing?

(6) Assuming *arguendo* that, under certain circumstances, a one-judge district court may have discretionary power to abstain in deference to a state court test, can such power be lawfully exercised where the *res* is in fact and in law a federally sanctioned implementation of an Act of Congress regulative of foreign commerce in reciprocity with foreign nations, and irreparable injury thereto is imminent, and no state court action is pending?

(7) Did the Court of Appeals err in holding that it was without jurisdiction to review the merits of any of the issues and matters presented by petitioner's appeals from the orders of Judges Bicks and Dimock?

(8) Since, as above stated (3), the complaint also invoked the "original jurisdiction" of the one-judge district court, did the Court of Appeals also act contrary to its statutory jurisdiction and obligation under 28 U. S. C. §§1291 and 1292 and 2106 in dismissing the petitioner's appeals?

(9) Did the Court of Appeals also err in dismissing the appeals *in toto* and without more, instead of vacating the orders of Judges Bicks and Dimock and remanding the case to the district court for "such further proceedings as may be just under the circumstances" (28 U. S. C. §2106)?

(10) Was not the dissenting judge in the Court of Appeals (Lumbard, C.J.) right in his opinion (111a *et seq.*) that, because the orders of Judges Bicks and Dimock were concededly otherwise appealable (108a, 109a, 110a, 111a), the Court of Appeals should "hear the appeals to decide first whether the single-judge district court had jurisdiction" on any ground, and, if it did, should then proceed to consider whether its action accorded with the merits?

(11) Did Judge Cashin erroneously repeat and perpetuate the errors by Judges Bicks and Dimock as to jurisdiction, the convening of a three-judge court and injunctive relief by his holding that their orders were "still in full force and effect" and "still the law of this case" by which he was bound (133a), notwithstanding that the Court of Appeals had declared them to be in excess of jurisdiction and hence nullities?

(12) Was not "abstention" also unlawful or, if discretion could be a factor, an abuse of discretion in view of the fact that the New York courts had uniformly held that the New York Alcoholic Beverage Control Law is inapplicable or "inoperative" if applied to sales of liquor for export in foreign commerce under constant United States Customs Bond, regulation and supervision—the very transactions here involved?

(13) Was not "abstention" also improper in view of the facts that the remedies available to petitioner in the New York courts under the New York Alcoholic Beverage Control Law are, in a case such as this, "inadequate" by their very terms and by the interpretation thereof by the New York Court of Appeals?

(14) Assuming *arguendo* that the petitioner was not entitled to the convening of a three-judge court, was it nevertheless entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C. §§1331 and 1337?

Statement of the Case

(1) *The Nature of the Case*

This action is for declaratory and injunctive relief and for an adjudication that the Constitution and laws of the United States and federal official action thereunder preclude the action of the New York State Liquor Authority in the professed enforcement and execution of the New York State Alcoholic Beverage Control Law against the petitioner's federally sanctioned export business and in destruction thereof.

Instead of answering, the defendants moved to dismiss the complaint "on the grounds that it fails to state a

claim" and "that the Court lacks jurisdiction over the subject matter" (42a).

Hence the facts pleaded expressly or by fair intendment must be deemed admitted for all present purposes. (F. R. C. P., Rule 8(f).)

No court below granted the motion to dismiss.

Judge Bicks truly said (51a) that the petitioner "faces the prospect of closing its doors, with consequent substantial damage".

Judge Dimock truly said (91a):

> "Plaintiff certainly raises a serious legal issue when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

The Court of Appeals thrice held that "a substantial federal question" is thus presented (104a, 107a, 108a).

(2) *Petitioner's Lawful Export Business*

The petitioner, a New York corporation, is engaged in selling United States Customs bonded, tax-free wines and liquors, solely for export, to overseas passengers from premises leased on October 31, 1956, from the New York Port Authority, a bi-State agency organized with the consent of Congress, at Idlewild Airport (2a, 35a-38a, 49a-50a, 90a, 130a-131a).

Each bottle of liquor sold by petitioner remains under continuous United States Customs bond, regulation and supervision from the time it is withdrawn from Class 6 United States Government bonded manufacturing warehouses, and the United States Customs bonded storage warehouses. During the time it is rewarehoused at the petitioner's premises under United States Customs control, and until the bottle is placed aboard the aircraft and delivered to the passenger after arrival at his foreign

destination (3a-5a, 36a). The petitioner is required to account, on United States Customs forms, for each and every bottle (3a, 36a).

The privilege accorded the outgoing passenger to export liquor free of tax and duty here or abroad is reciprocal to the privilege accorded incoming passengers to purchase a limited quantity of liquor in foreign countries for import into the United States free of tax or duty here or abroad, in accordance with reciprocal agreements with foreign governments (5a-6a, 37a).

The obvious purposes of the right, thus granted by the Federal Government, of thus exporting a bottle of liquor tax-free are (1) to encourage foreign commerce, and (2) to promote domestic exports,—a particularly pressing national interest in view of the present crisis in our balance of payments.

The United States Treasury Department, Bureau of Customs, supervises the conduct of petitioner's business and by letter of April 15, 1958 (37a) expressly "approved" and authorized the petitioner's procedure. It has also approved the petitioner's premises, and has prescribed the petitioner's procedures. It has also expressly ruled that the petitioner's business constitutes the exportation of merchandise within the meaning and sanction of §311 of the Tariff Act of 1930, 19 U. S. C. §1311 (15a-20a, 35a-37a, 50a, 131a).

The New York State Tax Commission had also ruled in writing as far back as August 2, 1954, that a business such as the petitioner's which consists of sales of liquor in United States Customs bond withdrawn for export from Class 6 warehouses under federal regulation, is not engaged in a "sale" subject to the New York State Alcoholic Beverage Tax (7a, 26a-27a, 62a).

(3) *The State Liquor Authority's Assertion that the Petitioner's Business is "Illegal" under New York Law*

After this sanction by the Federal Government the petitioner, out of an abundance of caution, inquired of the State Liquor Authority whether its business was subject to the New York State Alcoholic Beverage Control Law. The State Liquor Authority sought and obtained an opinion from the New York State Attorney-General (1960, Op. Atty. Gen., June 30) to the effect that (1) Idlewild's business constituted a "sale" within the meaning of the Alcoholic Beverage Control Law, §3(28), but (2) there is no provision of that Law which would authorize a license for such sales for export, (3) no person can sell alcoholic beverages within New York without a license and (4) hence the petitioner's business "may not be conducted in the State of New York" (21a-24a, 90a, 131a).

Thereupon the State Liquor Authority determined, and by letter dated July 11, 1960, so advised petitioner's counsel (25a), that its business

> "• • • is in conflict with the laws of the State of New York and, therefore, would be illegal."

(4) *The Institution of this Action to Protect the Petitioner's Federal Rights and Business*

The immediate practical effect of this "determination" was to place the petitioner in dire jeopardy and to confront it with the imminent loss of a business valued at over $1,000,000 (8a, 39a). As Judge Bicks found (51a, 188 F. Supp. at p. 436):

> "The New York Importers & Distillers Association circularized its members advising that in view of the position of the Attorney General and of §62 of the Alcoholic Beverage Control Law, they could not legally fill plaintiff's orders. Plaintiff has not since been able to make purchases to meet its requirements and faces

the prospect of closing its doors, with consequent substantial damage."

Furthermore, the petitioner and its officers were threatened by the State Liquor Authority with civil and criminal proceedings (7a, 8a, 39a, 40a).

This action for a declaratory judgment and for temporary and final injunction was accordingly instituted on July 22, 1960. Simultaneously the petitioner moved for a temporary injunction and for a restraining order pending determination thereof (41a). It also moved for the impanelling of a three-judge court pursuant to 28 U. S. C. §§2281 and 2284 (32a).

(5) *The Representations of the State Liquor Authority Before Judge Bicks that the Petitioner's Business was not Threatened by it*

Confronted with the square conflict between their claim of illegality under State Law and the petitioner's federal rights, the State Liquor Authority sought to delay an adjudication. It appeared before Judge Bicks by the Attorney-General of the State of New York and cross-moved to dismiss the complaint on the alleged grounds (among others) that the state courts afforded an "efficient remedy" and that (42a, 75a):

> "The complaint makes no claim that the State Liquor Authority is threatening, directly or indirectly, to take steps to interfere with plaintiff's operations. Since the plaintiff is a non-licensee, there is no real action the State Liquor Authority can take against the plaintiff."

In point of fact both the complaint (7a-12a) and the petitioner's moving affidavit (35a-41a) abundantly alleged factually that such threats were being made and irreparable damage had already begun.

(6) *Judge Bicks' Decision Remitting the Petitioner to the State Courts*

Judge Bicks recognized that the petitioner "faces the prospect of closing its doors, with consequent substantial damage" (51a), but because of what he characterized as the "tentative and hypothetical posture" of the case before him (53a), he decided (55a, 188 F. Supp. 437-8):

> "Although the substantive issues raised in the complaint may not be considered by the judge to whom application under 28 U. S. C. A. §2281 is made, he has the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity. (Citing cases)
>
> "Motion for impanelling of a three-judge court denied, with leave to renew after the state court has ruled."

Judge Bicks' opinion made no mention of 28 U. S. C. §§1331 and 1337 or of the original jurisdiction thereby imposed on the district court in just such a case as this.

He left the petitioner without any protection, temporary or otherwise, notwithstanding that no state court action existed (104a).

(7) *The Petitioner's Appeal and the Immediately Following Retaliation by the State Liquor Authority*

The petitioner promptly appealed Judge Bicks' decision (56a).

Five days later, the State Liquor Authority issued a subpoena *duces tecum* directed to the petitioner and calling for all its records. Notwithstanding its prior representations before Judge Bicks that "since the plaintiff is a non-licensee, there is no real action the State Liquor Authority

can take against the plaintiff" (64a, 67a, 75a), the subpoena expressly required the petitioner to appear and testify concerning its business "*under the license to sell alcoholic beverages issued by the State Liquor Authority*" (69a). (Emphasis supplied.)

Thus, the State Liquor Authority, acting under color of State law, reversed its field and went back on its representation to Judge Bicks that "there is no real action" or "steps to interfere" which it can take against petitioner. Instead, it now sought to cut in ahead of the Court of Appeals and to hale the petitioner before itself for an inquisition as prosecutor, judge and jury to pass upon its own assault upon the petitioner's Federal rights, and to get at the petitioner's list of suppliers, before the Court of Appeals could act (66a-68a, 75a, 76a, 83a, 91a).

Also no more overt interference could there be than the bald threats thereupon made on three occasions by officials of the State Liquor Authority to the several United States Customs bonded interstate truckers who had been making deliveries to the petitioner (76a, 78a-81a). This was a palpable attempt, *vi et armis*, to frustrate the petitioner's resort to the federal courts by immediately choking off its last lifeline of supply from out-of-state sources to which the petitioner had been driven because the State Liquor Authority's prior announced determination of illegality had frightened off its New York suppliers (51a, 131a).

(8) *Judge Dimock's Decision*

Accordingly, the petitioner again moved for a temporary injunction *pendente lite* and for the impanelling of a three-judge court (71a-72a), and also moved to quash the subpoena (57a). These motions came on before Judge Dimock, who held that he had to follow Judge Bicks (89a), but that (91a):

> "Plaintiff is entitled to an injunction against harassment by defendant pending the appeal from the order of Judge Bicks."

Judge Dimock acknowledged (91a):

> "Plaintiff certainly raises a serious legal question when it states that what New York is regarding as unlawful has been ruled by the United States to be lawful foreign commerce."

(9) *The Court of Appeals' Decision*

A majority of the Court of Appeals, Chief Judge Lumbard dissenting, held that, since "a substantial federal question existed" (104a, 107a, 108a), "a three-judge district court should have been convened" by Judge Bicks and Judge Dimock to decide, *inter alia*, whether to apply the so-called doctrine of "abstention" (109a, 110a); but that, although the orders of both judges were held to be otherwise appealable (105a-106a, 109a, 111a), nevertheless since Judge Bicks and Judge Dimock "had no jurisdiction to proceed, as he did, • • • we must conclude from *Stratton* (282 U. S. 10) that we have no jurisdiction to entertain an appeal" from either decision (108a, 110a).

The petitioner's appeals were thereupon "dismissed" without remand (116a).

The majority conceded "this result leaves us in a somewhat anomalous position" (108a), and concluded (110a):

> "The results we reach are unhappy ones. We a[re] refusing access to our court to a party who we belie[ve] is entitled to relief."

The petitioner's statutory right to the exercise of original jurisdiction by the district court with a single judge under 28 U. S. C. §§1331 and 1337 was again at least impliedly overruled.

In his dissenting opinion Chief Judge Lumbard took issue, saying (114a-115a):

"The majority's view, however, imposes on the federal courts a procedure of piecemeal review whereby a court of appeals is always forced to stay its hand whenever an appellant or appellee argues to it that the decision below should have been made by a three-judge court. No matter how worthless such a claim may be, we would not be able to dispose of it on an appeal from a final order but would have to await a decision on a petition for mandamus in the Supreme Court. Only after the Supreme Court decided the jurisdictional question might we be permitted to consider the merits, and the merits would not be ripe for Supreme Court review until we had passed upon them on remand. I cannot believe that the authority of the Supreme Court over three-judge tribunals was intended to extend so far as to preclude us from deciding the jurisdictional issue when a district judge enters an order that is otherwise appealable under 28 U. S. C. §§1291, 1292, and thereby to impose on the parties a procedure calling for separate appellate consideration of the jurisdictional and substantive questions."

(10) *Judge Cashin's Decision*

The petitioner promptly sought to comply with the declarations of the Court of Appeals and moved again in the District Court to convene a three-judge district court and for injunctive relief, in accordance with the procedure suggested by this Court in *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10, 18, and by Mr. Justice Stewart in *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 6 Cir., 252 F. 2d 317, 319.

Judge Cashin denied these applications. He characterized as "dictum" the holding by the Court of Appeals that "a three-judge district court should have been convened" (132a); and, overlooking the very *ratio decidendi* of that Court, he followed as "the law of this case" and

"as still in full force and effect" (133a) the very refusals by Judge Bicks and Judge Dimock to convene a three-judge district court which the Court of Appeals had just held to be erroneous, without jurisdiction and hence nullities.

(11) *The Court of Appeals' Refusal to Recall and Clarify Its Judgment*

In a final effort to avoid burdening this Supreme Court, counsel and the litigants with the expenditure of time, money and effort entailed by these conflicting judicial expressions, the petitioner moved in the Court of Appeals for an order clarifying its judgment of dismissal so as to test Judge Cashin's characterization as "dictum," and to remand this case to the District Court for "such further proceedings * * * as may be just under the circumstances," as authorized by 28 U. S. C. §2106.

The Court of Appeals' denial was without opinion (147a).

Summary of Argument

(1) The area of foreign commerce is reserved by the Commerce Clause, the Import-Export Clause and the Supremacy Clauses exclusively for the National Government; and the preemptive nature of legislation by Congress within that area is part of the total constitutional principle which requires "the supremacy of the national power in the field of foreign affairs". (*Hines* v. *Davidowitz*, 312 U. S. 52, 62-4.)

Acting within that exclusive area, Congress enacted Section 311 of the Tariff Act of 1930 (19 U.S.C. § 1311) and Sections 5521 and 5522 of the Internal Revenue Code (26 U.S.C.), and authorized the Secretary of the Treasury to prescribe regulations for carrying out the provisions and

policy thereof for all articles to "be made and manufactured in bonded warehouses" and "intended for exportation" (17a). Such congressional legislation and regulations were preemptive as an exercise of the supreme and exclusive national power under the foregoing Clauses of the Constitution in the area of foreign commerce. (*McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414; *Hood & Sons* v. *DuMond*, 336 U.S. 525, 535-8; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230; *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504.)

(2) As implementation of such exclusive and preemptive national legislation and its purposes for promoting our foreign commerce and reciprocal commercial relations with foreign countries and governments, the petitioner's business was expressly approved and sanctioned by the United States Treasury Department, Bureau of Customs, on April 15, 1958, as "an exportation of the merchandise within the meaning of section 311 of the tariff act", and was thereafter continuously under supervision, regulation and control by the Bureau of Customs (2a-6a, 15a, 16a, 35a-37a, 50a).

The right to engage in foreign commerce under Section 311 of the Tariff Act and Sections 5521 and 5522 of the Internal Revenue Code is not the gift of a state, and a state cannot regulate it or restrain or forbid it. In such an area, a state has no jurisdiction. (Decisions *supra*.)

In consequence, the petitioner had a right originating in and conferred by the foregoing Clauses of the Constitution and the foregoing federal legislation and regulations to the exercise of "the original jurisdiction" imposed upon the federal district court in cases arising "under the Constitution, laws, or treaties of the United States" and "under any Act of Congress regulating commerce" (28 U.S.C. §§1331 and 1337). Such original jurisdiction, so imposed, is itself part of the exercise of the supreme and exclusive national power in the area of foreign commerce and reciprocal relations with foreign governments. (*All American*

Airways v. *Village of Cedarhurst*, 201 F. 2d 273, 277; *Hines* v. *Davidowitz*, 312 U.S. 52; and decisions cited under Point III, *post*.)

Such original jurisdiction in the district court carries with it full judicial powers in "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and all Treaties made, or which shall be made, under their Authority." (Constitution, Art. III, Sec. 2). Included therein are powers to grant declaratory judgments, interlocutory injunctions, restraining orders and such other relief as the facts set forth in the statement of claim and accompanying proof may warrant. (F.R.C.P., Rules 1, 54(c) and 57.)

(3) In the present case, all courts and judges below recognized the immediate irreparable damage — indeed imminent extinction—which confronted petitioner from the defendants' assertions of illegality, threats against the petitioner and its domestic and interstate suppliers, and threats of civil and criminal proceedings (7a, 8a, 38a, 39a, 51a, 90a, 91a, 104a, 131a).

The facts presented to Judges Bicks, Dimock and Cashin by complaint and affidavits showed a present justiciable controversy involving present irreparable damage. (*Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 85; *California Commission* v. *United States*, 355 U.S. 534, 536-9; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83-4.)

(4) Power to abstain from exercise by a district court of acknowledged jurisdiction does not exist and is not lawfully exercised where the plaintiffs' rights derive from and are the creatures of an exclusive and preemptive national plan and exercise of national power under the Commerce, Import-Export and Supremacy Clauses of the Constitution and federal statutes and regulations thereunder. (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230; and cases cited under Point III, *post*.) *A fortiori* is this true where no state

court suit is presently existing, and irreparable damage is presently occurring.

Abstention for remission to a state sovereignty which has no jurisdiction over the rights so derived and so created is a logical and legal absurdity.

(5) Also abstention for remission to courts of a state which have already held through its highest tribunal that the state's Alcoholic Beverage Control Law has and can have no application to federal rights in foreign commerce, derived from and created by the exclusive and preemptive exercise of national power, as in the case of this petitioner. (*Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 209, 210, 212; aff'd 281 N. Y. 647; aff'd 309 U. S. 414, 427, 429; *During* v. *Valente*, 267 App. Div. 383, 385-6; *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68.)

(6) Also such abstention is never proper where relief obtainable under the state statute involved is inadequate. In the present case, the New York Alcoholic Beverage Control Law, Section 121, on which the Liquor Authority relied before Judge Bicks (64a-65a), provides the sole method for judicial review of action by that Authority, but expressly limits any judicial stay therein "pending the determination of the matter" "for a period not exceeding thirty days". (New York Consolidated Laws, ch. 3-B.) *Matter of Yacht Club Catering* v. *Bruckman*, 276 N. Y. 44, holds that this period is mandatory, regardless of "irreparable damage to the individual" (276 N. Y. at p. 48). In accord: *Barcus* v. *O'Connell*, 281 App. Div. 1064. The state remedies are therefore inadequate. *Burach* v. *State Liquor Authority of the State of New York*, 160 F. Supp. 161, 165 (E. D. N. Y. 1958).

(7) Even if, notwithstanding the allegations of complaint and affidavits, the doctrine of abstention could be considered, consideration of it was exclusively for the re-

quested three-judge district court. 28 U. S. C. §2284(5). Since irreparable damage was immediately occurring, the orders of Judges Bicks and Dimock for total abstention in the exercise of admitted jurisdiction, pending some state court suit not presently existing, were in fact and in law denials of interim protection,—a subject requiring the convening of a three-judge court. 28 U. S. C. §2284(5).

On the other hand, if the refusal to convene a three-judge court could for any reason have been lawful in this case, then the effectual denial of interim protection by abstention without such protection pending some future state court suit, would be a denial of the petitioner's right to the exercise of a single-judge court's original jurisdiction under 28 U. S. C. §§1331, 1337; and also such denial would be a refusal of the petitioner's application for interim protection appealable as of right to the U. S. Court of Appeals under 28 U. S. C. §1292(a)(1). (*Hines* v. *Davidowitz*, 312 U. S. 52, 62, footnote; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 65.)

(8) The majority in the Court of Appeals went contrary to that Court's statutory jurisdiction and obligation under 28 U. S. C. §§1291, 1292 and 2106, in holding that it had "no jurisdiction" to entertain the petitioner's appeals from the denials of its applications for a three-judge court and for a temporary injunction. (*General Electric Company* v. *Callahan*, 294 F. 2d 60, 65.)

The majority in the Court of Appeals also erred in dismissing the petitioner's appeals *in toto* and without more, instead of vacating the orders of Judges Bicks and Dimock and remanding the case for "such further proceedings to be had as may be just under the circumstances" (28 U. S. C. §2106). (*Phillips* v. *United States*, 312 U. S. 246, 248, 254; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392; *Gulla* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.)

Assuming *arguendo* that the single-judge district court rightly reserved jurisdiction pending final state court ac-

tion, the majority in the Court of Appeals erred in holding itself to be without jurisdiction to entertain the petitioner's appeal from the denial of a protective injunction pending a final state court adjudication. 28 U.S.C. §1291(a) (1).

(9) Even assuming *arguendo* that the petitioner was not entitled to the convening of a three-judge court, nevertheless the petitioner was entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C. §§1331 and 1337. (*Capital Service Inc.* v. *Labor Board,* 347 U. S. 501; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218; *Query* v. *United States,* 316 U. S. 486; *Public Utilities Commission* v. *Gas Co.,* 317 U. S. 456, 467.)

(10) Accordingly, we believe this Court should grant the three writs of mandamus here sought and on certiorari reverse the decision of the Court of Appeals in order that the federally created and sanctioned rights of the petitioner may be preserved and protected and not abandoned by the federal courts to immediate destruction.

ARGUMENT

POINT I

Since, with the express sanction of the U. S. Treasury Department, the petitioner was exercising rights and conducting a business legalized by federal statutes and rules regulative of commerce in furtherance of a national policy and in a field where the national power was exclusive and plenary, the petitioner had a federal right to protection of such sanctioned rights and business in the federal courts and could not lawfully be relegated to the uncertainties and restrictions of some futural suit in the courts of a state which had no sovereignty in the area wherein Congress had enacted and wherein state action was expressly prohibited by the Commerce, Import-Export and Supremacy Clauses.

A

We submit that Judge Bicks' opinion overlooked controlling distinctions and principles rendering inapplicable its reasoning and cases cited:

(1) The petitioner's rights and export business are the creatures of an Act of Congress in an area wherein the sovereignty of the Nation is supreme, exclusive and preemptive.

(2) The petitioner's complaint invokes the original jurisdiction expressly imposed on the district court for protecting the national implementations of such an Act of Congress from attempted frustration or veto by state legislation and organisms.

(3) The petitioner's complaint invokes the Supremacy Clause affirmatively for the protection of national action in the national field, and not merely negatively for the thwarting of state action in the field of private rights.

(4) The judicial precedents invariably affirm (as indeed they must) not only the right but the duty of the district court to proceed where the plaintiff's rights are grants under an Act of Congress in an area wherein the national sovereignty is supreme and preemptive and state intrusion is expressly excluded by the Commerce and Import-Export Clauses.

(5) Where rights so derived constitute the plaintiff's case, a district court negates the exclusive national sovereignty by sending the plaintiff into the courts of another sovereignty which has no jurisdiction at all in the area wherein Congress created such rights.

(6) In such a case violation of "comity" (if there be any) originates not with the district court in proceeding with its original jurisdiction but with the prior intrusion by the state agency into the preemptive national area.

(7) In none of the decisions cited by Judge Bicks were there present these controlling facts and principles. Wherever they were present, this Court and other federal courts have always upheld the duty of the district court to proceed as required by the governing statutes.

(8) Where, as here, New York attempts to declare illegal what the National Government, acting in its sphere, has legalized, a district court, while professing jurisdiction, effectually negates it by postponing its exercise. The result is the equivalent of a dismissal of the complaint. All relief, notwithstanding the imminent and irreparable damage, is refused.

B

(1) Essential to our constitutional structure is the principle thus enunciated in *Board of Trustees* v. *United States*, 289 U. S. 48, concerning the "exclusive and plenary" power of Congress over foreign commerce (pp. 56-7):

> "As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by state action. [Citing cases] The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Art. I, §10, par. 2. • • •
>
> The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."

Of necessity the power to regulate foreign commerce and make reciprocal commercial agreements with foreign nations is and must be exclusively in the United States as the constitutional representative of all the States for such purposes.

This exclusive and preemptive power over foreign commerce is part of the larger constitutional principle which requires "the supremacy of the national power in the general field of foreign affairs". (*Hines* v. *Davidowitz*, 312 U. S. 52, 62-64.)

"Plainly, the external powers of the United States are to be exercised without regard to state laws or policies." (*United States* v. *Belmont*, 301 U. S. 324, 331.)

This federal primacy in the field of foreign commerce and over the export of alcoholic beverages has been expressly recognized and acceded to by the New York courts. (*Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 210, aff'd 281 N.Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414; *Rosenblum* v. *Frankel*, 279 App. Div. 66, 68; *Dur-*

ing v. *Valente*, 267 App. Div. 383, 385-6.) Also by the courts of other states. (*National Distillers Products Corp.* v. *City and County of San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, cert. den. 352 U. S. 928; *Parrott & Co.* v. *City and County of San Francisco*, 131 Cal. App. 2d 332, 280 P. 2d 881.)

(2) The Tariff Act of 1930 is expressly entitled "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes". 46 St. p. 590.

To achieve these statutory objectives, the U. S. Bureau of Customs has evolved a regulatory scheme and program, of which this petitioner is a part, to encourage the export of domestic wines and liquor, free of federal or state tax. This program also embodies our relations with foreign nations which extend a *pro tanto* tax immunity, reciprocal to that granted by the United States (7a, 8a, 39a).

Accordingly, Section 311 of the Tariff Act of 1930, 19 U. S. C. §1311 and the regulations thereunder clearly constitute a comprehensive and preemptive federal program in the national interest and with foreign nations, immune from let or hindrance by New York. "The right to engage in interstate commerce is not the gift of a state" and "a state cannot regulate it or restrain it." *Hood & Sons* v. *Du Mond*, 336 U. S. 525, 535, 537-538.

Hence here we have at stake a national concern "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230; *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504; *Hines* v. *Davidowitz*, 312 U. S. 52, 62-69.

Moreover, "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Pennsyl-*

vania v. *Nelson*, 350 U. S. at p. 502; *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230.

Customs regulations within the purview of the Congressional enactments as to foreign commerce are "necessary or appropriate" "means to the desired end." (*McGoldrick* v. *Gulf Oil*, 309 U. S. 414, 428.)

Accordingly, we submit, since the exported liquor here involved is in a federal enclave and under federal sovereignty for a federal purpose, the federal courts may not abandon their *statutory* jurisdiction and obligation in exaggerated deference to a supposed "comity" or some supposed state right to priority of procedure. *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 386, 391-2; *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 536-538; *Maynard & Child, Inc.* v. *Shearer, Ky.*, 290 S. W. 2d 790, 794.

Remission to a sovereignty which has no jurisdiction over the rights and property presented for protection is a logical and legal absurdity.

Moreover, it invites state courts into matters of national policy which the Constitution and Congress have expressly committed to the judicial power of the United States, and thereby would entail all the hazards, multiplicities, confusions and delays inherent in dual jurisdiction. (*Pennsylvania* v. *Nelson*, 350 U. S. 497, 509.)

(3) "Where the issue is essentially federal, the federal court proceeds at once." (*All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273, 277.) "It is a function the federal courts must perform even though state action is involved." (*General Electric Company* v. *Callahan*, 294 F. 2d 60, 66.)

If the New York Alcoholic Beverage Control Law is inapplicable, the petitioner will be entitled to an injunction against its attempted enforcement here by a state officer or agency. If, on the other hand, the New York law is applicable in its terms, then "it would conflict with federal

law and the ban of the supremacy clause would come into play." *Penagaricano* v. *Allen Corporation*, 267 F. 2d 550, 558. For this reason, the federal court upheld the exercise of jurisdiction in that case, stating (pp. 557-558):

> "* * * a preliminary glance at the apparent clash between federal and local authority reveals that * * * the exercise of federal authority here involved is wholly within the confine of a valid federal enactment * * *. And, whatever the local courts may hold to be the meaning of the local Act, the plaintiffs will be entitled to relief from its application. That is to say, *the plaintiffs will be entitled to the relief they request whichever way the local Act is construed.*" (Emphasis added.)

But here "there can be no doubt" of the "direct clash" of the New York statute as construed by the New York Attorney General and as pressed and acted on by the New York Liquor Authority "with the federal regulations" and hence "no occasion for postponement here for possible state action." *All American Airways* v. *Village of Cedarhurst*, 201 F. 2d 273, 277; *Chicago* v. *Atchison Topeka & Santa Fe R. Co.*, 357 U. S. 77, 84, 89; *California Commission* v. *United States*, 355 U. S. 534, 538, 539; *General Electric Co.* v. *Callahan*, 294 F. 2d 60, 64-5, decided August 24, 1961.

As truly said by Mr. Justice Harlan in his concurring opinion in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 250, "conflict is the touchstone of preemption."

POINT II

Moreover, the doctrine of abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. Here the facts, so far from being those requisite to the exception, exclude it.

(1) The limited and exceptional applicability of the doctrine of abstention was thus formulated by this Court in *Alleghany County* v. *Mashuda Co.*, 360 U. S. 185, 188-189 (1959):

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

And later in its opinion this Court said (p. 196):

> "The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. * * * It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.' *Forsyth* v. *Hammond*, 166 U. S. 506, 513."

In *Propper* v. *Clark*, 337 U. S. 472 (1949) the Alien Property Custodian, a federal agent in a field wherein the

federal government was supreme by reason of its war power, sued for property claimed by a state court receiver who urged that the federal court should abstain pending state court decision as to the state statutes involved. Holding to the contrary, this Court said (p. 492):

> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia, Spector, Fieldcrest* and *Pullman* cases, *supra,* but in the absence of special circumstances, 320 U. S. 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy."

In *Meredith* v. *Winter Haven,* 320 U. S. 228 (1943), this Court said (p. 237):

> "No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess."

(2) We know of no decision where, on facts even remotely resembling those here present, this Court has ever countenanced abstention or postponement.

If, on the present facts and notwithstanding the explicit grounds of original jurisdiction, the district court rightly turned this petitioner away and, without any protection at all, deferred it to some presently non-existent state court action, then "abstention" has assuredly become the rule, while the possibility of exception becomes too nebulous for meaningful formulation.

Here New York is attempting to veto what the United States has established; to tear down what the United States has built up.

If such a *res* is not the primary concern of the district court, we cannot conceive what more must be added to make it so.

There was no time for temporizing, experimenting or speculating. The State Liquor Authority, supported by the State Attorney General, had already proscribed; had cut all the petitioner's lifelines; and was moving toward civil and criminal prosecution and extinction.

POINT III

An unbroken line of decisions in this and other federal courts uphold the right of this petitioner, by reason of the foregoing facts and principles, to an immediate and full exercise of the original jurisdiction of the district court.

In *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, this Court held that the federal district court should grant relief without awaiting state court litigation under circumstances far less compelling than those present here. There officials of the State of Oklahoma seized a consignment of liquor consigned to the federal military reservation at Fort Sill, purporting to act under a State law forbidding the importation or transportation of intoxicating liquor in the State without a permit.

Since the federal power over military reservations was supreme and exclusive, this Court held the Oklahoma statute inapplicable in law, whether or not applicable by its terms, and stated (321 U. S. at p. 386):

> "To construe the state statute in the manner urged would be to say that, although Oklahoma admittedly

> has no power directly to regulate the liquor traffic on the Reservation, the Oklahoma legislature intended practically to exclude from the Reservation liquor which might be put to legal uses under controlling United States laws."

Immediate exercise of federal jurisdiction was likewise upheld because of federal preemption in *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.*, 357 U. S. 77. There, this Court held that the City of Chicago had no power to place under license pursuant to its Code motor vehicle service between terminals of interstate railroads because such service was (p. 89) "an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act."

There, as here, the argument was made that decision should be postponed pending a State court adjudication (p. 84). This Court replied (p. 84):

> "Under the circumstances we do not believe this procedure is warranted."

In *California Commission* v. *United States*, 355 U. S. 534, this Court affirmed an injunction issued by a three-judge court restraining the California Public Utilities Commission from enforcing a state statute which would subject to state regulation the rates charged by common carriers for transporting Government property. In rejecting the arguments that there was no "actual controversy" because the Commission had not as yet acted adversely, and that the Government should first pursue administrative remedies before the California Commission, this Court held (355 U. S. at p. 538):

> "The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates, unless the Commission first gives its approval."

And this Court went on to quote in a footnote (p. 544) the following by Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 427:

> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

In *Florida Lime Growers* v. *Jacobsen, Director*, 362 U. S. 73, the appellants were engaged in the business of growing, packing and marketing Florida avocados in interstate commerce pursuant to the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69 issued thereunder. They claimed that the California Department of Agriculture was, inconsistently with this federal regulation of interstate commerce, declaring illegal the sale of their avocados in California for noncompliance with the requirements of the California Agricultural Code. A three-judge district court in California had dismissed the complaint on the ground that the plaintiffs' "claim at best suggested no more than a threatened controversy" (169 F. Supp. 774, 776)—just as Judge Bicks here held that the instant case was in a "tentative and hypothetical posture" (53a).

This Court reversed on the ground that the California authorities, by consistently taking the position that the shipments were illegal, had created "an existing dispute between the parties as to present legal rights amounting to a justiciable controversy" (p. 85) which threatened the plaintiffs with irreparable damage and loss of the product, and that, since the plaintiffs' rights were grounded in an Act of Congress regulating interstate commerce, they were entitled to a decision on the merits by a three-judge district court.

Query v. *United States*, 316 U. S. 486, upheld the same principle. The pertinency of the decision is shown in its first headnote:

> "A suit to restrain the enforcement of a state tax on the purchase and sale of goods at Army Post Exchanges, upon the ground that such Exchanges are federal instrumentalities and that therefore the state statute imposing the tax is, as applied to them, unconstitutional, is a suit cognizable by a three-judge District Court, under Jud. Code §266."

In *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, the Yosemite Park & Curry Co. sued to enjoin the California Attorney General and the Board of Equalization from enforcing within the limits of the Yosemite National Park California's Alcoholic Beverage Control Act. As the ground of jurisdiction, the plaintiff alleged that it was operating within the Park hotels, camps and stores under a contract and lease from the United States Secretary of the Interior. On the plaintiff's appeal from an adverse decision by a three-judge district court, this Court held that, since the plaintiff's rights were grounded in legislation by the United States as the owner of the Park, a decision on the merits of the controversy was the proper function of a three-judge district court, and it remanded for such a determination "in accordance with this opinion of the applicability of such sections of the (California) Act as the State may threaten to enforce" (p. 539). Remission to the California Board of Equalization for consideration of the interpretation and application of the California Alcoholic Beverage Control Act was not envisaged.

Indeed, under the circumstances here present, a district court of three judges would have had the power and would have been bound to enjoin a state enforcement suit against the petitioner if such a suit had then been pending. To quote *Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501, 504:

> "But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 468-470; *Bowles* v. *Willingham*, 321 U. S. 503, 510-511."

In *Hines* v. *Davidowitz*, 312 U. S. 52, where this Court affirmed an injunction by a three-judge district court enjoining officials of the Commonwealth of Pennsylvania from enforcing against an alien provisions of the Pennsylvania Alien Registration Act on the ground that it conflicted with the Federal Alien Registration Act, this Court on page 62 appended the following footnote:

> "The importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field are clearly developed in Federalist papers No. 3, 4, 5, 42 and 80."

In *General Electric Co.* v. *Callahan*, 294 F. 2d 60, the Court of Appeals for the First Circuit in a decision rendered last August said (pp. 65-6):

> "The question is whether federal legislation has 'pre-empted the field' which the State Board acting under the Massachusetts statute proposes to enter. The answer depends upon the construction of federal legislation and this, of course, is a function of the federal courts. And it is a function the federal courts must perform even though state action is involved."

POINT IV

The decisions cited by Judge Bicks (52a-55a) are, we submit, wholly inapposite in their facts and rationales.

(1) The last cited is *Martin* v. *Creasy*, 360 U. S. 219. There the plaintiffs had no such federal status as this petitioner and their rights and property no preemptive federal origin. The plaintiffs were merely private land owners. Their sole claim was that the Governor of Pennsylvania was about to designate their lands as "a limited access highway", and that subsequent proceedings under the state condemnation statute might not provide adequate compensation. This Court held that Pennsylvania's officers and agencies had not as yet challenged the plaintiffs' constitutional rights to full compensation. Moreover, the plaintiffs had pending a state court suit in which the Supreme Court of Pennsylvania had already interpreted the condemnation statute as providing (to quote this Court) "a complete procedure to guard and protect the plaintiffs' constitutional rights 'at all times' " (p. 223).

Decided on the same day as *Martin* v. *Creasy*, was *Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, a case also cited by Judge Bicks (53a). Its inappositeness appears, we submit, on its face.

There the plaintiffs were merely private New York membership corporations which wished to contribute assistance to colored persons engaged in litigations involving their constitutional rights. The plaintiffs feared that certain Virginia statutes might make such assistance criminal. The Virginia authorities, instead of taking steps against the plaintiffs, or threatening to do so, assured the plaintiffs and the federal courts that they were "withholding action under the authority of the (state) statutes until a final decision is reached" in the state courts as to their meaning

and application. This Court stated that there was no reason to assume that "such assurances will not be honored"; but that, if they were not, the district court could extend protection while the state "case goes forward" (p. 179).

In the present case not only were there no such "assurances", but the contrary. No state suit was pending. The district court refused protection in the meanwhile.

In *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, cited by Judge Bicks as the "beginning" case (52a), certain Texas railroads sued to enjoin an order of the Texas Railroad Commission requiring that no sleeping cars should be operated unless there was in charge a conductor as well as a porter. The primary issue was whether the Commission had statutory authority to make the order. This Court stated (p. 498) that, since pullman porters were colored and conductors white, the Commission's order "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open"; and that (p. 501) resort to the adequate means "with full protection" furnished by the state court procedures was such an alternative. Furthermore, the plaintiffs, unlike the petitioner here, were not sanctioned instrumentalities of a preemptive federal statutory plan; and their business was not confronted with destruction, immediate or otherwise.

The other decisions of this Court cited by Judge Bicks (52a-55a), such as *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 100, and *Burford* v. *Sun Oil Co.*, 319 U. S. 315, are in the same pattern of fact and legal principle as the above, and, for like reasons, have no application here.

(2) Judge Bicks' description of the controversy as having merely a "tentative and hypothetical posture" (53a) was inconsistent with his own finding that at the very time the case was before him the actions of the State Attorney General and Liquor Authority had cut the petitioner's supply lines and faced it with "the prospect of closing its doors" (51a).

The complaint and the affidavits before Judges Bicks and Dimock clearly stated a present justiciable controversy causing present irreparable damage (*Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85; *California Commission* v. *United States*, 355 U. S. 534, 536-9; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83-4).

POINT V

Furthermore, in abstaining the exercise of an acknowledged jurisdiction, pending some future state court action, Judge Bicks erred in his own reasoning by overlooking that the New York appellate courts had repeatedly held the New York Beverage Control Law inapplicable or "inoperative" as against the very thing here involved, namely, the export of liquor under Section 311 of the Tariff Act of 1930 and the Internal Revenue Code.

Judge Bicks was mistaken in his basic statement that "the issues have never been presented to or passed upon by the state courts" (54a). The opposite is the fact.

In *Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207 (1st Dept., 1939), aff'd 281 N. Y. 647, aff'd *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, the Appellate Division upheld a protest against the imposition of a New York City sales tax on oil manufactured in bond and stored in Class 6 Warehouses under U. S. Customs regulations and supervision pursuant to §311 of the Tariff Act of 1930, 19 U. S. C. §1311. After emphasizing "the careful control exercised by government officials over goods that have been taken into Class 6 Warehouses" and the fact that such goods are "constantly under government supervision" (256 App. Div. at p. 209), the Court continued (p. 210):

> "The power of Congress to regulate commerce with foreign nations 'is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualified or impeded to any extent by State action. * * * The power is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of the Congress. Art. I, §10, par. 2.' (*Board of Trustees* v. *United States*, 289 U. S. 48.")

And the Appellate Division further said (p. 212):

> "The regulation of the product being so complete and the purpose thereof so manifest as a proper exercise of the power of Congress under the Commerce Clause it must be held that the tax is a burden on foreign commerce and repugnant to the expressed intention of Congress."

Both the New York Court of Appeals and this Court affirmed. The Court of Appeals adopted what was said by the Appellate Division (281 N. Y. 647). This Court said that the purpose of this federal legislation was to (309 U. S. at p. 427):

> "* * * enable the American manufacturers to compete more favorably with their foreign competitors * * *."

Accordingly, this Court concluded (309 U. S. at p. 429):

> "The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce."

If there is no state or local power to tax exports under Section 311 of the Tariff Act of 1930, *a fortiori* there is no power to proscribe them.

In *During* v. *Valente*, 267 App. Div. 383 (1st Dept., 1944) the New York Appellate Division held that the pro-

visions of the Alcoholic Beverage Control Law were not applicable or were "inoperative" if applied to sales of liquor in foreign commerce in the Free Trade Zone of the Port of New York.

In so holding, the Appellate Division stated (267 App. Div., at pp. 385, 386):

> "It is obvious that this zone is created under the power of Congress to regulate commerce with foreign nations. This power is exclusive and plenary. • • •
>
> "The fact that this trade zone is within the geographical limits of the State of New York is not controlling. • • •
>
> "The allegations herein are consistent with the sale of the brandy in foreign commerce or the mere transfer of title to goods remaining in the trade zone. In such a transaction the State statute requiring licenses and permits is inoperative as imposing an added burden upon foreign commerce which Congress has the exclusive power to regulate. (*Matter of Gulf Oil Corp.* v. *McGoldrick, supra.*)"

In *Rosenblum* v. *Frankel*, 279 App. Div. 66 (1st Dept., 1951) the same Court reaffirmed *During* v. *Valente, supra*, and held (p. 68):

> "Neither do the regulatory powers of the State Liquor Authority extend to international transactions, even in alcoholic beverages, except sales for domestic consumption in New York State."

Hence there was no occasion or justification here for postponing the full exercise of the district court's original jurisdiction or for remitting the petitioner to the state courts.

In *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629, the Supreme Court held that there was no occasion for "re-

mitting the claimant to the state courts for determination of the local law question" where, as here, the State courts have given "an authoritative interpretation of the local law."

POINT VI

Furthermore, even if, *arguendo*, the state remedies afforded by Alcoholic Beverage Control Law §121 were deemed available to the petitioner, they are by their very terms inadequate for the petitioner's protection and have been so held judicially.

By its subpoena *duces tecum* issued to the plaintiff, the State Liquor Authority sought to cut in ahead of the petitioner's appeal and to hale the plaintiff before itself as the tribunal to pass upon its own challenge to the plaintiff's federal rights (75a-76a, 84a-85a).

Alcoholic Beverage Control Law §121, on which the defendants relied before Judge Bicks (66a-67a), provides the sole method for judicial review of determinations of the State Liquor Authority. But Section 121 provides that no stay may be granted by the New York courts in such a proceeding except "for a period not exceeding thirty days". *Matter of Yacht Club Catering* v. *Bruckman*, 276 N. Y. 44 holds that this period is mandatory, regardless of "irreparable damage to the individual" (276 N. Y. at p. 48). In accord: *Barcus* v. *O'Connell*, 281 App. Div. 1064 (3rd Dept., 1953).

For this reason, the State "remedy" afforded by Section 121 is utterly inadequate, and the Court so held in *Burack* v. *State Liquor Authority of State of New York*, 160 F. Supp. 161 (D. C., N. Y., 1958). Judge Rayfiel there issued a temporary injunction restraining the State Liquor Authority from using wire-tap evidence in a proceeding to revoke or suspend a license. After referring

to the holding in *Benanti* v. *United States,* 355 U. S. 96, 104, that the Federal Communications Act and §605 thereof in particular "is a comprehensive scheme for the regulation of interstate communication", Judge Rayfiel held that the federal statute was preemptive, and concluded, in language which could have been written for this case, that §121 of the Alcoholic Beverage Control Law did *not* provide an adequate state remedy and that a temporary injunction should be granted. Judge Rayfiel said (160 F. Supp. at p. 165):

> "A further reason for my conclusion is the provision in §121, supra, that no stay shall be granted pending the determination of the matter for a period of more than thirty days. That period may not be extended. *Barcus* v. *O'Connell,* 281 App. Div. 1064, 121 N. Y. S. 2d 366. Because of that 30-day provision *the time still available for the filing and final determination of state court proceedings is inadequate. Even if the plaintiff should be successful in such a proceeding he would win but a Pyrrhic victory.*"

So here. If the petitioner had followed Judge Bicks' remission and sought in the state courts a judicial review, it "would win but a Pyrric victory," indeed not even that because its business and its lease would have been long dead before a final determination.

In *Pacific Tel. Co.* v. *Kuykendall,* 265 U. S. 196, the Supreme Court noted that the State law permitted a stay against a decision of a State administrative tribunal for only a limited period (there, one year). The Supreme Court reversed the decision of the district court refusing jurisdiction and held (pp. 204-205):

> Under such circumstances *comity yields to constitutional right,* and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a federal court of equity

from suspending the daily confiscation, if it finds the case to justify it."

Even under the statutes forbidding the district courts to exercise jurisdiction over a challenge to State taxes or rate orders, the Supreme Court has uniformly held that the district court should exercise jurisdiction unless it affirmatively appears that "a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. §§1341, 1342.

Corporation Comm. v. *Cary*, 296 U. S. 452, 458;
Mountain States Co. v. *Comm.*, 299 U. S. 167, 170;
Driscoll v. *Edison Co.*, 307 U. S. 104, 110;
Hillsborough v. *Cromwell, supra*, 326 U. S. 620, 628.

POINT VII

Even assuming *arguendo* that Judges Bicks, Dimock and Cashin lawfully decreed abstention, nevertheless they should not have left the petitioner naked to the current lethal assaults upon it by the State Liquor Authority, but should have made their own reservation of jurisdiction meaningful by enjoining those assaults pending reasonably expeditious outcome in some future suit in the state courts. The refusal of Judges Bicks and Dimock to do so was appealable to the Court of Appeals.

1. Judge Bicks recognized that petitioner "faces the prospect of closing its doors" (51a). More importantly perhaps, a door fashioned by the Nation for its foreign commerce and fulfillment of its commercial agreements with other nations likewise faced closing!

By retaining jurisdiction, the single-judge district court likewise retained its concomitants. Hence, in order to make and keep its retention meaningful by keeping the *res*

undestroyed by the current mortal assaults, the district court should at the very least have temporarily enjoined such assaults pending ascertainment of the adequacy of protection procurable in some futural suit in the state court. Otherwise, in the interval the plaintiff's rights could well become moot for lack of a *res*.

In *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, one of the two most recent cases cited by Judge Bicks (53a), this Court rested heavily on the fact that the state agency gave acceptable "assurances" that no hostile action would be taken pending final decision by the state courts (p. 179).

Here, not only was no such assurance given, but the Liquor Authority and the State Attorney General continually intensified its war against the petitioner. (*Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73, 85; *California Commission* v. *United States*, 355 U. S. 534, 538.)

2. Abstention by Judges Bicks and Dimock from granting a temporary injunction was equivalent to a refusal appealable to the Court of Appeals. 28 U. S. C. §§1291 and 1292(a)(1). The dismissal of the appeal by the Court of Appeals for lack of jurisdiction was like error.

POINT VIII

Even if, notwithstanding the allegations of the complaint and affidavits, the doctrine of abstention could be considered, consideration of it was exclusively for the requested three-judge district court pursuant to 28 U. S. C. §§2281, 2284.

(1) The duty of a single-judge district court to determine initially whether there is present "a substantial federal question" to confer jurisdiction is altogether different from his duty, after determining that jurisdiction does exist, to proceed with it as required by 28 U. S. C. §§2281, 2284.

The former duty is a statutory duty at the threshold. The latter is a juridical duty after the threshold has been passed. Hence, in no sense is the latter an incident to or a corollary of the former.

To contend the contrary is to confuse two subjects entirely distinct in fact, in law and in their timing,—to confuse the initial query as to the existence of jurisdiction with the subsequent uses of an existing jurisdiction.

Judge Bicks affirmed jurisdiction by the very act of retaining it, but he denied the application for a temporary injunction by the very act of abstaining from granting it.

(2) If analogy be sought, "abstention", as ordered by Judge Bicks, had apt analogy, if not identity, with denial of temporary injunction,—a subject exclusively for the three-judge court [28 U. S. C. §2284(5)].

As the Court of Appeals truly said here (106a):

> "Appellant was effectively out of court,—any action upon its prayer for injunctive relief was indefinitely postponed under these circumstances."

Hence, we believe sound and inescapable, both in general principle and especially in the circumstances of this case, the holding of the Court of Appeals that (108a):

> "the determination of whether a federal court ought to abstain is a determination that may only be made in the first instance by a three-judge district court."

In short, we submit that the statute, the nature of the issue itself, and the nature, effect and consequence of the determination to abstain required consideration by a three-judge district court.

The statute for a three-judge court is "highly remedial legislation" and should not be "evaded and circumvented" by judge-made exceptions. (*Board of Supervisors* v. *Tureaud*, 207 F. 2d 807, 808-9, vacated and remanded on other grounds, 347 U. S. 971.)

POINT IX

In any event the Court of Appeals erred, we submit, in not vacating the orders of Judge Bicks and Judge Dimock which it held to have been made without jurisdiction, and in not remitting the case for "such further proceedings to be had as may be just under the circumstances." 28 U. S. C. §2106.

(1) The failure of the Court of Appeals to vacate those orders in order to formalize its decision that they were made without jurisdiction and hence nullities, left the door open for Judge Cashin's subsequent interpretation (which we are contesting as yet another anomaly) that such orders are "still in full force and effect" and "still the law of the case" (133a).

All three judges in the Court of Appeals have agreed that "the orders made by Judges Bicks and Dimock are of the sort which are ordinarily appealable" to that Court under 28 U. S. C. §§1291 and 1292(a)(1) (105a-106a, 109a, 111a).

The majority, however, reached the frankly "*anomalous* position" (108a) of distinguishing its own recent decision in *Bell* v. *Waterfront Commission of New York Harbor*, 279 F. 2d 853 (107a, 109a), and of dismissing Idlewild's appeals, on the very grounds that Idlewild was right in its contentions that "a substantial federal question existed" on constitutional grounds and that "a three-judge district court should have been convened" (109a).

Assuming, *arguendo*, that the Court of Appeals could not lawfully have followed through by directing the district court to convene a three-judge court, nevertheless that Court had power to effectuate the very ground of its own decision by formally vacating as nullities the orders of the district court and by remanding the case for further consideration,—precisely as empowered by 28 U. S. C. §2106.

This course has been repeatedly taken by other appellate courts (including this Court) in identical circumstances.

In *Phillips* v. *United States*, 312 U. S. 246, this Court held that the suit had been mistakenly brought under Section 266 of the then Judicial Code and that, in consequence, a three-judge court had been mistakenly convened and had mistakenly acted under that section. An appeal having been taken to this Court from the three-judge decision, this Court held itself without authority to entertain the appeal (p. 248), but that (p. 254):

> "While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, enforce the limitations of §266 by an order framed to save appellants their proper remedies. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392. We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals."

In *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, this Court held, under like circumstances, that it was without jurisdiction to entertain the appeal, but nevertheless directed, in order to "save to the appellants their proper remedies", that (p. 392):

> "But in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings

to be taken independently of §266 of the Judicial Code. *Gully* v. *Interstate Natural Gas Co., supra.*"

The identical course on substantially identical facts was also taken by this Court in *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.

In *Board of Supervisors* v. *Tureaud*, 207 F. 2d 807, vacated and remanded on other grounds 347 U. S. 971, a single-judge district court had refused to convene a three-judge court and had proceeded with hearing the case itself. Appeal was taken to the Court of Appeals for the Fifth Circuit which held (p. 810):

> "We are in no doubt that the suit from which this appeal comes was one for three judges, that the district judge was without jurisdiction to hear and determine the application for injunction, and that the order should be vacated and the cause remanded to the district judge with directions to take further proceedings not inconsistent herewith."

In *Two Guys From Harrison-Allentown* v. *McGinley*, 266 F. 2d 427, the Court of Appeals for the Third Circuit held under like circumstances that (p. 433):

> "We have the power to vacate the order of the court below improvidently entered but we can go no further. Cf. Section 2106, 28 U. S. C. We do not, however, possess the power to adjudicate the merits of the appeal. Consequently, we will vacate the judgment of the court below and will remand the cause for appropriate action."

(2) The failure of the Court of Appeals to vacate orders which it declared to be erroneous and without jurisdiction, had the effect of creating a decision which it itself described as "anomalous" and productive of "unhappy results," and also of creating the further anomaly of

Judge Cashin's decision that those very orders "are still the law of this case" (133a),—a conclusion directly contradicted by the inherent inconsistency and by *Dictagraph Products Co.* v. *Sonotone Corp.*, 230 F. 2nd 131, dism. per stip. 352 U. S. 883.

POINT X

Assuming for argument's sake that the petitioner was not entitled to the convening of a three-judge court, nevertheless it was entitled for its adequate protection to the exercise of the original jurisdiction of the district court under 28 U. S. C., Sections 1331 and 1337.

The refusals of the single-judge district court to proceed with the exercise of that jurisdiction and to grant the petitioner protection by temporary injunction were errors appealable to the Court of Appeals; and the action of the Court of Appeals in dismissing the appeals for lack of jurisdiction was further error.

If it be assumed for the sake of argument that the petitioner did not state a case falling within the purview of Sections 2281-4, U. S. C., nevertheless the complaint and moving affidavits stated a clear case for the protection of this petitioner under Sections 1331 and 1337, 28 U. S. C., imposing upon the district court original jurisdiction over actions arising as does this action.

In a district court a plaintiff is entitled to whatever relief the statement of claim shows him to be entitled. F. R. C. P., Rule 8(e)(2) and (f), Rule 54(c) and Rule 57.

Sections 2281-4 do not draw to themselves every case where federal injunction is sought against state officials or bodies claiming to act under authority of the state. Where, in a field *pre-empted* by Act of Congress regulating commerce, the plaintiff is acting under authorization of the Act

and in implementation thereof, the fact that the suit seeks a federal declaratory judgment that a state or a state official or agency claiming to act under state authority has no jurisdiction in such pre-empted area does not relieve a single-judge district court from accepting and exercising full jurisdiction under Sections 1331 and 1337, U. S. C.

Any failure or refusal to accept such jurisdiction and to proceed with it on the merits is appealable to the U. S. Court of Appeals. If the latter court also similarly fails or refuses, this second error can be corrected here.

In the present case, Section 311 of the Tariff Act of 1930 and Sections 5521-3 of the Internal Revenue Code have entrusted the Treasury Department and its Bureau of Customs to be the federal agency to administer the provisions and policies thereof in the field of foreign commerce; and the Treasury Department, Bureau of Customs, has expressly authorized the petitioner to conduct under its supervision this very business as "an exportation of merchandise within the meaning of section 311 of the Tariff Act" (16a).

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, a federal district court had dismissed suits brought by a warehouseman licensed under the United States Warehouse Act to enjoin further proceedings on a complaint filed by one of his customers with the Illinois Commerce Commission and to enjoin the Attorney General of Illinois from instituting proceedings against the warehouseman to enforce any order of the Commission in the matter. The Circuit Court of Appeals reversed on the ground that the United States Warehouse Act superseded state regulation of warehousemen licensed thereunder as to the matters presented in the complaint; and this Court affirmed. Its holdings on this subject are correctly summarized in headnotes 2 and 4:

> "2. Warehouses licensed under the United States Warehouse Act need not obtain state licenses or comply with state laws regulating those phases of the busi-

ness which are regulated under the Federal Act, except those phases of the business which the Federal Act expressly subjects to state law."

"4. The test of applicability of state laws is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State."

In *Capital Service, Inc.* v. *Labor Board*, 347 U. S. 501, this Court upheld the jurisdiction of a single-judge district court under 28 U. S. C. §1337 to issue an injunction against a state Labor Board whose action conflicted with the exclusive jurisdiction of the National Labor Relations Board. This Court said (p. 504):

"But where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right. See *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 468-470; *Bowles* v. *Willingham*, 321 U. S. 503, 510-511."

To the same effect are, among many like decisions by this Court, *Query* v. *United States*, 316 U. S. 486; *Public Utilities Commission* v. *Gas Co.*, 317 U. S. 456, 467.

Conclusion

We submit that this Court (1) should grant the three writs of mandamus here sought against Judges Bicks, Dimock and Cashin to correct their respective refusals to exercise the jurisdiction to which the petitioner was entitled; and (2) should on certiorari reverse the decision of the Court of Appeals in holding itself without jurisdiction to do aught but dismiss the petitioner's appeals without more; and (3) grant such other relief as may be in the interests of justice, together with costs as against the State Liquor Authority.

Respectfully submitted,

CHARLES H. TUTTLE,
Counsel and Attorney for Petitioner,
15 Broad Street,
New York 5, New York.

JOHN F. KELLY,
STUART H. JOHNSON, JR.,
Also of Counsel.